No. 06-157

IN THE

Supreme Court of the United States

JAY F. HEIN, DIRECTOR, WHITE HOUSE OFFICE OF FAITH-BASED AND COMMUNITY INITIATIVES, ET AL.,
Petitioners,

v.

FREEDOM FROM RELIGION FOUNDATION, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN ATHEISTS, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
BACKGROUND	2
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. THE FAITH-BASED CONFERENCES INJURE TAXPAYERS AND VIOLATE THE ESTABLISHMENT CLAUSE	10
A. Taxpayers Have Standing To Challenge the Faith-Based Conferences Because the Conferences Cause Funds Appropriated by Congress To be Diverted to Religious Organizations	10
B. Training Religious Organizations To Apply for Grants at Faith-Based Conferences and Administering Grant Programs To Favor Religion Violates the Establishment Clause	15
II. EVEN CONSIDERED INDEPENDENTLY OF GOVERNMENT GRANTS, THE FAITH-BASED CONFERENCES SUBJECT TAXPAYERS TO AN ARTICLE III INJURY	18
A. The Government Misstates the Nature of the Injury By Assuming the Faith-Based Conferences Do Not Require Direct Expenditures	19
B. The Injury to Taxpayers in this Case Is No Less Concrete than the Injury in *Flast v. Cohen*	20

TABLE OF CONTENTS—Continued

Page

C. The Injury Here Involves Direct Expenditures and Therefore Does Not Resemble the Injury in *Valley Forge College v. Americans United* and Related Cases 23

D. The Court of Appeals Faithfully Applied This Court's Precedent Governing Taxpayer Standing 26

CONCLUSION 29

TABLE OF AUTHORITIES

CASES Page

Agostini v. Felton, 521 U.S. 203 (1997) 15
Allen v. Wright, 468 U.S. 737 (1984) 28
Bowen v. Kendrick, 487 U.S. 589 (1988) ..... *passim*
Columbia Union College v. Oliver, 254 F.3d 496 (4th Cir. 2001) 17
DaimlerChrysler Corp. v. Cuno, 126 S.Ct. 1854 (2006) 21, 24, 28
Doremus v. Bd. of Educ., 342 U.S. 429 (1952) 20, 21, 25
Everson v. Bd. of Educ., 330 U.S. 1 (1947) 11, 12, 15, 16
Flast v. Cohen, 392 U.S. 83 (1968) ..... *passim*
Freedom from Religion v. Chao, 433 F.3d 989 (7th Cir. 2006) ..... *passim*
Hunt v. McNair, 413 U.S. 734 (1973) 13
Mitchell v. Helms, 530 U.S. 793 (2000) 16, 17, 18
Murray v. Curlett, 228 Md. 239 (1962) 2
Ohio Nat. Life Ins. Co. v. United States, 922 F.2d 320 (6th Cir. 1990) 27
Roemer v. Bd. of Pub. Works of Maryland, 426 U.S. 736 (1976) 13
Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203 (1963) 2
Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974) 25, 26
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 27
Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 20
Tilton v. Richardson, 403 U.S. 672 (1971) 13
Torcaso v. Watkins, 367 U.S. 488 (1961) 16
United States v. Richardson, 418 U.S. 166 (1974) 25, 26
Valley Forge College v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) ..... *passim*

TABLE OF AUTHORITIES

STATUTES AND LEGISLATIVE HISTORY Page

Central Intelligence Agency Act of 1949, 30 U.S.C. § 403a *et seq.* 25

Federal Agencies and Conference Spending, Hearings Before the Subcomm. on Federal Financial Management, Government Information and International Security of the S. Comm on Homeland Security and Government Affairs, 109th Cong. (2006) 7, 10

Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 *et seq.* 23

OTHER AUTHORITIES

28 C.F.R. § 38.2 8

David Kuo, *Tempting Faith* 209 (2006) 4, 6, 19

Exec. Order No. 13,198, 66 Fed. Reg. 8,497 (2001) 3

Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (2001) 2, 10

Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (2002) 3, 7

Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (2002) 3

Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (2004) 3

Fed. R. Civ. P. 12 27

George W. Bush, Remarks at the White House Conference on Faith-Based and Community Initiatives, Philadelphia, Pennsylvania (Dec. 12, 2002) 5

Government Accountability Office, *Faith-Based and Community Initiative* (June 2006) ....*passim*

Prepared Remarks of Attorney General John Ashcroft, White House Faith-Based Conference, Tampa, Florida (Dec. 5, 2003) 5

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BRIEF OF *AMICUS CURIAE* AMERICAN ATHEISTS, INC. IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE* [1]

American Atheists, Inc. is a volunteer organization active in protecting the rights of nonbelievers and promoting tolerance and understanding of the atheist viewpoint. Its perspective is rooted in the philosophy of materialism,

[1] The parties have consented to the filing of this brief. Copies of the letters of consent are on file with the Clerk of the Court. Counsel for American Atheists authored this brief in its entirety. No person or entity, other than American Atheists, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

"which holds that nothing exists but *natural* phenomena."[2] Founded in 1963 by Dr. Madalyn Murray O'Hair,[3] American Atheists has been dedicated for over forty years to advocating the separation of church and state. American Atheists founded the first known atheist library and archives in the United States, produced American Atheist Forum, the first regularly scheduled television program produced, directed, and broadcast by atheists, and founded the American Atheist Press, the American Atheist magazine, and the American Atheist Radio Series. The organization also engages in legal actions to preserve First Amendment values. Accordingly, American Atheists submits this brief in support of Respondents Freedom from Religion and its members and urges the Court to affirm the decision of the Seventh Circuit Court of Appeals.

BACKGROUND

On January 29, 2001, nine days after his inauguration as President of the United States, George W. Bush issued an Executive Order that created the White House Office of Faith-Based and Community Initiatives ("OFBCI") for the express purpose of using federal funds to "expand the role" of religious organizations and "increase their capacity." Exec. Order No. 13,199, § 3(a), 66 Fed. Reg. 8,499 (2001). The Executive Order directed OFBCI to "coordinate a national effort to expand opportunities" for religious organizations and undertake "a comprehensive effort to enlist, equip, enable, empower and expand the work" of religious organizations. Exec. Order No. 13,199, pmbl. & § 2. That same day, in a separate Executive Order, President Bush directed five

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[2] Madalyn Murray O'Hair, *Atheism*, American Atheists, *available at* www.atheists.org/Atheism/atheism.html (last visited Jan. 29, 2007).

[3] American Atheists was founded following this Court's ruling in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), overturning the Maryland Court of Appeals' approval of public school Bible readings in *Murray v. Curlett*, 228 Md. 239 (1962).

federal agencies to establish Executive Department Centers for Faith-Based and Community Initiatives ("Faith-Based Agency Centers"), and instructed the Faith-Based Agency Centers to incorporate religious organizations "in department programs and initiatives to the greatest extent possible." Exec. Order No. 13,198, § 3(b), 66 Fed. Reg. 8,497 (2001).[4] On December 12, 2002, President Bush signed Executive Order 13,279, which weakened the separation between federally-funded services and inherently religious activities, allowing religious organizations to provide federally-funded services in facilities permeated by "religious art, icons, scriptures, or other symbols." Exec. Order No. 13,279, § 2(f), 67 Fed. Reg. 77,141 (2002).

To further this campaign of channeling government money to religious organizations, OFBCI in 2002 began to orchestrate a series of Faith-Based Conferences and to date has held 29 such events.[5] The Faith-Based Conferences operate as training and recruiting grounds that favor religious applicants for government grants and thereby give religious groups an advantage over secular groups in the process of applying for grants. The conferences generate a steady stream of well-crafted applications from religious groups by "provid[ing] participants with information about the government grants process and available funding opportunities"

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[4] In subsequent Executive Orders, President Bush directed other federal agencies to establish similar Faith-Based Agency Centers. Exec. Order No. 13,280, 67 Fed. Reg. 77,145 (2002); Exec. Order No. 13,342, 69 Fed. Reg. 31,509 (2004).

[5] White House, *WHOFBCI Accomplishments in 2006* ("White House, *WHOFBCI Accomplishments*"), *available at* www.whitehouse.gov/government/fbci/2006_accomplishments.html (last visited Jan. 29, 2007); White House, *Logistics, Seattle, Washington, January 18, 2007* ("White House, *Logistics*"), *available at* www.dtiassociates.com/FBCI/logistics WA.cfm? location=WA (last visited Jan. 29, 2007).

and offering "various grant writing tutorials."[6] Thousands of individuals attend the Faith-Based Conferences,[7] which have trained 26,000 "new and potential federal grantees" since 2002.[8]

Apart from the grants themselves, the Faith-Based Conferences require substantial expenditures of government funds entirely separate from any costs attributable to the salaried time that Executive Branch officials use to orchestrate, manage, and attend the conferences.[9] Expenses incurred by the Faith-Based Conferences include renting ballrooms, meeting rooms, and overflow space for the massive conferences at hotels across the nation;[10] sending mailings prior to the conferences "to every church, synagogue, mosque, and social service organization within two hundred miles [of the conference location], about 20,000 invitations" per conference;[11] and allowing thousands of individuals to attend each conference. Attendance at the conferences is without charge to the participants, so that taxpayers and the public fisc bear the full financial burden of the events.[12]

The Faith-Based Conferences are designed to aid religious organizations. Atheists, agnostics, and other secular groups are discouraged from attending by the pervasively religious

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[6] White House, *Faith-Based & Community Initiative*, *available at* www.whitehouse.gov/government/fbci/president-initiative.html (last visited Jan. 29, 2007).

[7] David Kuo, *Tempting Faith* 209 (2006); United States Department of Justice, *E-Alert*, *available at* www.ojp.usdoj.gov/fbci/newsletters/ealert002.htm (last visited Jan. 29, 2007).

[8] White House, *WHOFBCI Accomplishments*.

[9] Kuo, *Tempting Faith*, at 231.

[10] *Id.* at 211; Amy Sullivan, "Patron Feint," *New Republic*, Apr. 3, 2006.

[11] Kuo, *Tempting Faith*, at 209.

[12] White House, *Logistics* (stating that the conferences are free for attendees).

atmosphere of the Faith-Based Conferences, which include prayer and performances of "All Hail, King Jesus" by religious choirs.[13] At a typical conference, President Bush opened his remarks by assuming that there was not a single atheist or agnostic in an audience of over one thousand: "You love God with all your heart and all your soul and all your strength."[14] The President's assumption evidently was correct, for the audience responded enthusiastically to his speech by shouting "Preach on, brother!"[15] In remarks at another Faith-Based Conference, then-Attorney General John Ashcroft, after identifying "faith" as a "fundamental value[] that define[s] our nation," made the same assumption, telling the audience, "through the message of faith, you uphold our values."[16]

American Atheists is unaware of any events designed to train atheist, agnostic, or other secular nonprofit groups to apply for grants. By singling out religious groups for special training, the government has provided a unique advantage over other groups in the process of applying for government funds.

By welcoming the faithful, and making it clear that atheists and agnostics need not attend, the Faith-Based Conferences ensure a constant flow of grant applications from religious organizations. The Executive Branch then discriminates further between applicants in selecting grantees on

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[13] Adelle M. Banks, "Bush Touts His Faith-Based Initiative Despite Congressional Foot-Dragging," *Religion News Service*, June 2, 2004, *available at* pewforum.org/news/display.php?NewsID=3481 (last visited Jan. 29, 2007).

[14] George W. Bush, Remarks at the White House Conference on Faith-Based and Community Initiatives, Philadelphia, Pennsylvania (Dec. 12, 2002).

[15] *Id.*

[16] Prepared Remarks of Attorney General John Ashcroft, White House Faith-Based Conference, Tampa, Florida (Dec. 5, 2003).

the basis of religion. According to a former Special Assistant to President Bush, the grants process is rife with religious discrimination. Kuo, *Tempting Faith*, at 212-16. In awarding grants from the Compassion Capital Fund, a grants program created by Congress in 2002 under the Taxing and Spending Clause, the Department of Health and Human Services convened "an overwhelmingly Christian group of wonks, ministers, and well-meaning types" whose "biases were transparent." *Id.* at 213-14. The group was tasked with rating organizations on a scale from 1 to 100, and these ratings determined which organizations would receive grants.[17]

According to Kuo, "[i]t was obvious that the ratings were a farce." Kuo, *Tempting Faith*, at 214. In fact, one of the raters stated that "when [she] saw one of those non-Christian groups in the set [she] was reviewing," she "just stopped looking at them and gave them a zero." *Id.* at 215-16. She further stated that such behavior was typical among the raters. *Id.* at 216. Due to such conduct, "Jesus and Friends Ministry from California, a group with little more than a post office box," scored much higher than Big Brothers/Big Sisters of America and other leading national charities. *Id.* at 214.

This system of using Faith-Based Conferences to give religious organizations an advantage in applying for grants and then selecting grantees on the basis of religion has achieved the desired result. According to the congressional testimony of a Department of Housing and Urban Development (HUD) official, the Faith-Based Conferences contributed to a major increase in HUD funding for religious

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[17] Kuo, *Tempting Faith*, at 214-15. *See also* Government Accountability Office, *Faith-Based and Community Initiative* 6 (June 2006) ("*GAO Report*") (stating that the decisions to award grants "were generally based on applicants' scores" assigned by raters).

organizations between Fiscal Years 2002 and 2004,[18] and in Fiscal Year 2005, religious organizations received $2.1 billion in federal grants, nearly twice what they received in Fiscal Year 2003.[19] The White House announced that "[d]ue to the President's leadership, more faith-based organizations are participating in the Federal grants process," and that the Department of Health and Human Services has nearly doubled the number of grants to religious organizations since Fiscal Year 2002.[20]

Additionally, after channeling unprecedented levels of monetary aid to religious organizations, the Executive Branch has turned a blind eye when recipients divert the money to inherently religious activities. On paper, a religious organization is not allowed to misuse federal funds by offering activities such as prayer during government-funded services, such as counseling.[21] According to GAO, however, religious organizations often flout this requirement in practice. *GAO Report* at 6-7, 34-36. After surveying 13 organizations that receive federal grants and offer voluntary religious services, GAO found that four of these organizations "did not appear to understand the requirement to

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[18] *See Federal Agencies and Conference Spending, Hearings Before the Subcomm. on Federal Financial Management, Government Information and International Security of the S. Comm on Homeland Security and Government Affairs*, 109th Cong. 58 (2006) (statement of James M. Martin, Acting Deputy Chief Financial Officer, HUD).

[19] White House, *Fact Sheet: Compassion in Action* (March 2005) ("White House, *Fact Sheet*"), *available at* www.whitehouse.gov/news/releases/2005/03/20050301-1.html (last visited Jan. 29, 2007); White House, *WHOFBCI Accomplishments*.

[20] White House, *Fact Sheet*.

[21] *See* Exec. Order No. 13,279, § 2(e) ("[O]rganizations that engage in inherently religious activities, such as worship, religious instruction, and proselytization, must offer those services separately in time or location from any programs or services supported with direct Federal financial assistance . . .").

separate [inherently religious] activities in time or location from their program services funded with federal funds." *Id.* at 7. One religious organization official told GAO "that she discusses religious issues while providing federally funded services," and others stated that they "pray with beneficiaries during program time." *Id.* Another religious organization official confessed that she began government-funded social services for children by reading from the Bible. *Id.* at 35.

According to GAO, several federal agencies fail to visit more than 5 to 10 percent of grant recipients in a given year. *Id.* at 37. GAO further stated that "[f]ew government agencies administering [grant] programs monitor organizations to ensure compliance with [] safeguards" regarding inherently religious activities. *Id.* at 6-7, 29. GAO reviewed financial and performance reports submitted to federal agencies by religious organizations that received federal grants, but "none of the reports . . . contained any questions related to compliance with the safeguards" that prohibit the use of government funds in inherently religious activities. *Id.* at 36. GAO also reported that the Department of Justice's Community Corrections Contracting program contained "no reference to the prohibition on inherently religious activities," which "could be read as allowing all providers of social services in [correctional] settings to engage in worship, religious instruction, or proselytization."[22] In sum, GAO concluded that "the government has little assurance" that safeguards surrounding the use of federal funds are enforced. *Id.* at 52.

GAO further found that in many cases federal agencies not only fail to monitor the use of grant money but neglect even to inform religious organizations of their legal obligations. *Id.* at 30-34. In fact, most federal agencies that provide grants to religious organizations do not even tell grant recipients that

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[22] *GAO Report* at 32. *See also* 28 C.F.R. § 38.2(b)(2).

they cannot discriminate on the basis of religion in providing social services. *Id.* at 29.

SUMMARY OF ARGUMENT

The Faith-Based Conferences at issue in this case lie at the heart of a scheme to funnel tax dollars to religious organizations in violation of the Establishment Clause of the First Amendment. As a training ground that favors religious organizations in identifying and applying for grant funds appropriated by Congress under the Taxing and Spending Clause, the conferences directly result in the award of government money on the basis of religion. Not only do the conferences single out and favor sectarian organizations by hosting what amounts to religious pep rallies, the unconstitutional impact is exacerbated by discrimination in the selection of grantees that receive government funding. Moreover, through lax oversight, federal funds earmarked for various secular social programs ultimately are spent to support inherently religious activities, such as prayer and prosthelytizing.

This Court has held that the Establishment Clause exists to prevent Congress from using its taxing and spending power to foster religion, *Flast v. Cohen*, 392 U.S. 83 (1968); *Bowen v. Kendrick*, 487 U.S. 589 (1988), and that Executive Branch misuse of grant funds appropriated by Congress inflicts an Article III injury on taxpayers. As in *Flast* and *Kendrick*, the taxpayers in this case have standing because the Faith-Based Conferences injure them by directly promoting a religious message and by causing congressionally appropriated grant funds to flow to religious organizations.

Although the Faith-Based Conferences are part of a broader scheme of religious discrimination in disbursing government grants, the expenditures necessary to support the conferences, even standing alone, inflict an Article III injury. Convened in ballrooms and conference rooms of hotels across

the nation, and attended by thousands of officials from religious organizations, the Faith-Based Conferences require substantial out-of-pocket expenditures, *i.e.*, costs over and above expenses that would accrue regardless of whether the conferences were held. Accordingly, contrary to the government's view, this case does not involve merely a challenge to government officials' use of salaried time or to general overhead expenses. Rather, the taxpayers in this case also contest direct spending that inflicts a concrete and palpable injury on taxpayers and directly assaults the public fisc.

ARGUMENT

I. THE FAITH-BASED CONFERENCES INJURE TAXPAYERS AND VIOLATE THE ESTABLISHMENT CLAUSE

A. Taxpayers Have Standing To Challenge the Faith-Based Conferences Because the Conferences Cause Funds Appropriated by Congress To be Diverted to Religious Organizations

The Faith-Based Conferences form an indispensable component of the Executive Branch's drive to "enlist, equip, enable, empower and expand the work" of religious organizations, Exec. Order No. 13,199, § 2, and to do so by discriminating against secular groups in the award of government funds. According to Executive Branch officials themselves, the increase in government grants is a "demonstrated benefit[] of conference activities," *Federal Agencies and Conference Spending*, 109th Cong. 57-58, and government funding for religious organizations nearly doubled between Fiscal Year 2003 and Fiscal Year 2005, *see supra* pp. 6-7. This dramatic increase in funding for religion is the direct result of an integrated scheme of religious discrimination in which the Executive Branch first uses the Faith-Based Conferences as a means of giving religious groups a leg up in the application process and of generating an increased pool of

well-crafted grant applications from them, and then discriminates on the basis of religion in deciding which applicants will receive grants. *See supra* pp. 3-6. In short, the Faith-Based Conferences directly cause injury to taxpayers by diverting funds appropriated by Congress to religious groups.

The use of tax dollars to support religion is the very type of injury the Establishment Clause was designed to prevent. Although "[a] large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support . . . government favored churches," many settlers suffered from the "practices of the old world" even in the colonies. *Everson v. Board of Education*, 330 U.S. 1, 8-9 (1947). Such abuses of the power to tax and spend "aroused . . . indignation" and engendered "the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions." *Id.* at 11. In the Virginia Assembly, "Thomas Jefferson and James Madison led the fight" against taxation that supported Virginia's established church. *Id.* at 11-12. In his Memorial and Remonstrance Against Religious Assessments, James Madison, "who is generally recognized as the leading architect of the religion clauses of the First Amendment," stated that the taxing and spending power has the potential to injure taxpayers because "'the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.'" *Flast*, 392 U.S. at 103 (quoting 2 Writings of James Madison 183, 186 (Hunt ed. 1901)). Renewal of the tax was defeated in committee, and the Virginia Assembly squarely condemned taxation that supports religion by enacting Thomas Jefferson's Virginia Bill for Religious Liberty, which proclaimed that "to compel a man to furnish contributions of money for the propagation of opinions which

he disbelieves, is sinful and tyrannical." *Everson*, 330 U.S. at 12.

Like the Virginia Bill for Religious Liberty, the Establishment Clause "reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out." *Id.* at 8. Animated by concern that "religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general," the Establishment Clause was "designed as a specific bulwark against such potential abuses of governmental power." *Flast*, 392 U.S. at 103-04. It exists to ensure that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions." *Everson*, 330 U.S. at 16.

Despite this specific guarantee against coercive taxation in aid of religion, if taxpayers could not challenge the use of government grants to advance religion, much of the Establishment Clause would become a dead letter. This Court's jurisprudence therefore allows a taxpayer to challenge "an exercise by Congress of its power under Art. I, s 8, to spend for the general welfare [where] the challenged program involves a substantial expenditure of federal tax funds." *Flast*, 392 U.S. at 103. Thus, in *Flast* and *Kendrick*, this Court found that taxpayers had standing to contest Executive Branch action that caused congressionally appropriated grant funds to flow to religious groups. *Id.* at 105-06; *Kendrick*, 487 U.S. at 19-20.

In this case, as in *Flast* and *Kendrick*, the Faith-Based Conferences cause specific grant funds appropriated by Congress to be diverted to religious organizations because the conferences are the primary means of training religious organizations to apply for grants and giving such organizations an advantage in the applications process. Thus, while the Faith-Based Conferences themselves are funded through general appropriations, the misuse of general appropriations

is not the only constitutional injury that they cause. Rather, the Faith-Based Conferences also inflict an injury on taxpayers by causing increasing levels of specific, earmarked funds to be transferred into the coffers of religious organizations.

By asserting that the Faith-Based Conferences cause the misuse of grant funds appropriated by Congress, the taxpayers in this case mount as an as applied challenge to Executive action under congressional spending programs. *Kendrick* discussed the distinction between facial and as applied challenges in detail and held that taxpayers have standing to assert both types of challenges. 487 U.S. at 600-02, 618-20. Whereas facial challenges directly contest the constitutionality of a congressional enactment, as applied challenges center on "the manner in which [the enactment] has been administered in practice" by the Executive Branch. *Id.* at 601. In *Kendrick*, this Court stated that its prior cases "expressly recognized that an otherwise valid statute authorizing grants," *i.e.*, a facially valid statute, can be "challenged on the grounds that the award of a grant in a particular case would be impermissible." *Id.* Although the government contended in *Kendrick* that taxpayers lacked standing to assert an as applied challenge to the Executive Branch's disbursement of funds under a congressional grants program, this Court roundly rejected the argument. *Id.* at 619. *See also Tilton v. Richardson*, 403 U.S. 672, 676 (1971) (not questioning standing of taxpayers who "brought . . . suit for injunctive relief against the [Executive Branch] officials who administer" the Higher Education Facilities Act of 1963); *Hunt v. McNair*, 413 U.S. 734, 735-40 (1973) (not questioning state taxpayer's standing to challenge action by state executive branch under the Establishment Clause); *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 741-44 (1976) (same).

The government mischaracterizes this Court's precedent when it asserts that *Flast* applies "only when the congressional spending *itself* causes the alleged injury." Pet. Br. at 27 (emphasis added). The taxpayers in *Flast*, as in *Kendrick* and in this case, did not directly contest any congressional action but rather challenged the way in which the Executive Branch expended funds appropriated by Congress under the Taxing and Spending Clause. *Flast*, 392 U.S. at 87 (taxpayers did not assert facial challenge to congressional appropriations under the Elementary and Secondary Education Act of 1965, but rather to manner in which "federal funds have been disbursed under the Act" by Executive Branch); *Kendrick*, 487 U.S. at 619 ("Indeed, Flast itself was a suit against the Secretary of [Health, Education, and Welfare], who had been given the authority under the challenged statute to administer the spending program that Congress had created."). The taxpayers in this case raise a similar as applied challenge by contesting the manner in which the Executive Branch uses the Faith-Based Conferences to channel congressional grant funds to religious organizations.

The government's view that taxpayer standing exists only to directly challenge congressional enactments would eliminate taxpayers' ability to raise as applied challenges. Taxpayers could *never* challenge the disbursement of grants as applied because such challenges, by definition, contest "the manner in which [the enactment] has been administered" by the Executive Branch, not the statute as enacted by Congress. *Id.* at 601. As the Seventh Circuit recognized, such an outcome would equip the Executive Branch with unfettered authority to use funds appropriated by Congress in aid of religion, even to the point of allowing "the Secretary of Homeland Security . . . to build a mosque and pay an Imam a salary to preach in it." *Freedom from Religion v. Chao*, 433 F.3d 989, 994 (7th 2006). Such a result would destroy the "bulwark" that the Framers built against the use of the taxing

and spending power "to aid one religion over another or to aid religion in general," *Flast*, 392 U.S. at 104, and eviscerate taxpayer standing as a means of defending rights guaranteed by the Establishment Clause.

B. Training Religious Organizations To Apply for Grants at Faith-Based Conferences and Administering Grant Programs To Favor Religion Violates the Establishment Clause

The Faith-Based Conferences are specifically orchestrated to train religious groups to apply for government grants, and they foster an atmosphere that excludes secular nonprofit groups. By catering especially to those who "love God with all [their] heart and all [their] soul and all [their] strength," the conferences function as religious rallies, hospitable only to certain religious groups. *See supra* pp. 4-5. Once the conferences serve their purpose of giving religious organizations a special advantage in the process of applying for grants by training them to submit well-crafted grant proposals, the Executive Branch selects grantees by discriminating against secular and non-Christian groups and awarding grants to obscure Christian organizations at the expense of national secular organizations with proven track records. *See supra* pp. 5-6. Finally, after religious organizations acquire government funds, the Executive Branch compounds the Establishment Clause violation by effectively allowing these organizations to use grants for prayer and prosthelytizing. *See supra* pp. 7-9.

By enabling the Executive Branch to award grants on the basis of religion, the Faith-Based Conferences force dissenters to pay "tithes and taxes," *Everson*, 330 U.S. at 10, in support of a system of religious discrimination. Holding Faith-Based Conferences and awarding grants on the basis of religion "define[s] . . . recipients [of government aid] by reference to religion." *Agostini v. Felton*, 521 U.S. 203, 234

(1997). This discrimination against non-religious groups contravenes the most basic mandate of the Establishment Clause, for the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers." *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). *See also Everson*, 330 U.S. at 15 ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal government . . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."). While the government can provide aid irrespective of the religion of the beneficiaries, the scheme at issue here clearly uses religious belief as a primary criterion first in creating Faith-Based Conferences uniquely designed for religious groups and then in awarding grants on the basis of religion. *See Mitchell v. Helms*, 530 U.S. 793, 809 (2000) (plurality opinion) (Establishment Clause is not violated where "the religious, irreligious, and areligious are all alike eligible for governmental aid"); *Everson*, 330 U.S. 1 (holding that the government may provide busing to children who attend religious schools, so long as it does the same for other children).

After using Faith-Based Conferences to generate grant applications and preferentially awarding grants to Christian groups, the Executive Branch compounds the Establishment Clause violation by looking away as religious groups divert government money to inherently religious activities. *See supra* pp. 7-9. The Establishment Clause flatly bans diverting federal funds to support inherently religious activities. *Kendrick*, 487 U.S. at 609 ("[W]e have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion."). Therefore, the government's provision of aid to religious institutions violates the Establishment Clause unless the government creates adequate safeguards against diverting funds to religious activities. *Mitchell*, 530 U.S. at 861-63 (O'Connor, J., concurring). *See*

also Kendrick, 487 U.S. at 612 ("[W]e have . . . struck down programs that entail an unacceptable risk that government funding would be used to 'advance the religious mission' of the religious institution receiving aid.").

This Court has described the types of safeguards necessary to prevent the use of government funds to aid religious enterprises. In *Mitchell*, for example, Justice O'Connor listed the types of provisions that would be "constitutionally sufficient" where government funding ultimately benefited both religious and non-religious schools.[23] In that case, Justice O'Connor found safeguards against the use of aid for religious activities sufficient because they included: (1) a requirement that all private schools that receive government money sign written assurances that the funds "will only be used for secular, neutral, and nonideological purposes"; (2) monitoring by the state educational agency of each local educational agency that received funds; (3) "random review of [each] school's library books for religious content," to ensure government funds are not used to purchase religious books; (4) annual reminders to school administrators regarding the prohibition on the use of government aid for religious purposes, coupled with random sampling of materials and equipment, including library books the nonpublic school has acquired, to ensure that they comply with the program's secular content restriction; and (5) rejection of any new books a school wishes to purchase with government funds "whose title reveals (or suggests) a religious subject matter." 530 U.S. at 861-63.

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[23] *Mitchell*, 530 U.S. at 861 (O'Connor, J., concurring). Justice O'Connor's concurrence, which Justice Breyer joined, provided the decisive votes in *Mitchell*. Because Justice O'Connor articulated a more narrow rationale than the plurality, her concurring opinion states the holding of the Court. *Columbia Union College v. Oliver*, 254 F.3d 496, 504 & n.1 (4th Cir. 2001).

Needless to say, no such safeguards accompany the grants made in association with the Faith-Based Conferences at issue in this case. As the *GAO Report* reveals, the Executive Branch's "hear no evil, see no evil" approach to monitoring religious organizations that receive federal funds is a far cry from the safeguards deemed sufficient in *Mitchell*. The GAO found that the federal agencies that administer grants to religious organizations do not visit most grant recipients, *GAO Report* at 37, do not audit many grant recipients, *id.* at 36, do not ask about the diversion of federal funds to religious activities when they do conduct audits, *id.* at 6-7, 36, and often do not even inform grant recipients that federal funds cannot be used for religious activities, *id.* at 30-34. As a result, religious organizations use government funds to hold prayer and conduct Bible reading. *See supra* pp. 7-8. Lackadaisical monitoring therefore compounds the Establishment Clause violation—and the constitutional injury inflicted on taxpayers—that begins with training religious organizations to apply for grants at Faith-Based Conferences, continues through a grant applications process that discriminates on the basis of religion, and ends in religious organizations' using taxpayer money for prayer and prosthelytizing.

II. EVEN CONSIDERED INDEPENDENTLY OF GOVERNMENT GRANTS, THE FAITH-BASED CONFERENCES SUBJECT TAXPAYERS TO AN ARTICLE III INJURY

Even if they did not feed into a scheme designed to funnel federal funds to religious organizations, the Faith-Based Conferences themselves are comparable to revival meetings organized and funded at taxpayers' expense. Each of the Faith-Based Conferences requires substantial expenditures of general appropriations funds over and above the earmarked grant money that the conferences ultimately divert to religious organizations. These general appropriations expenditures are not, as the government asserts, limited to expenses

such as general overhead or salaried time that government officials use to attend, organize, and speak at the conferences. Rather, each conference costs approximately $100,000 in new, direct expenditures,[24] and the 29 conferences since 2002 have cost nearly $3 million in tax dollars. *See supra* p. 3. Even if this Court disagrees with the argument that the misallocation of earmarked grant funds caused by the Faith-Based Conferences confers standing, taxpayers nonetheless have standing to challenge the Executive Branch's misuse of tax funds to finance the conferences themselves.

A. The Government Misstates the Nature of the Injury By Assuming the Faith-Based Conferences Do Not Require Direct Expenditures

The government repeatedly downplays the expenditures necessary to bankroll the Faith-Based Conferences by suggesting such costs consist of little more than the portion of government officials' salaries that funds their attendance and activities at Faith-Based Conferences.[25] Starting from this flawed premise, the government reaches the facile and erroneous conclusion that taxpayers have not suffered a direct injury caused by the expenditure of public funds.[26]

The government's description of the claim reflects a crabbed and unreasonable version of the Amended Complaint that commenced this case, which is not confined to government officials' speeches or to other activities supported by their salaries.

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[24] Kuo, *Tempting Faith*, at 231.

[25] *See* Pet. Br. at 24 (expenditures consist "solely . . . [of] salaries and supplies"); *id.* at 43 (this case involves "the speeches and day-to-day activities of Executive Branch officials").

[26] *See id.* at 25 (taxpayers in this case do not allege a "direct dollars-and-cents injury"); *id.* at 29 (analogizing the injury here to salaries paid to teachers who read from the Bible during class); *id.* ("[The] real complaint [of the taxpayers in this case] [is] not [a] dollar-and-cents injury . . .").

To the contrary, the Amended Complaint encompasses all expenditures necessary to plan, organize, and manage the Faith-Based Conferences: "The defendants . . . organize, set up and conduct such public events to advance funding for faith-based organizations, using Congressionally enacted budget appropriations to conduct such advocacy . . . ." Amended Compl. ¶ 39; *id.* ¶ 32 ("Defendants' actions . . . include the support of national religious conferences . . ."); *id.* ¶ 36 ("The conferences and public events organized, set up and run by the defendants . . . are funded with Congressional budget appropriations . . ."). Because this case involves a motion to dismiss, these averments and all reasonable inferences from the complaint must be drawn in favor of the non-moving party, *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002), and in any event, it is patently unreasonable to assume that massive conferences, held across the nation and financed with government money, are conducted at no direct cost to the public fisc. That assumption, moreover, is plainly false, as the Faith-Based Conferences require the Executive Branch to incur direct costs. *See supra* p. 4.

B. The Injury to Taxpayers in this Case Is No Less Concrete than the Injury in *Flast v. Cohen*

This Court's precedent draws a clear line between litigants who have standing because they challenge under the Establishment Clause substantial and direct expenditures of funds appropriated by Congress, *see Flast* 392 U.S. 83; *Kendrick*, 487 U.S. 589, and litigants who lack standing because they do not challenge direct expenditures, *see Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982); *Doremus v. Bd. of Educ.*, 342 U.S. 429 (1952). Here, as in *Flast*, Congress used its taxing and spending power to extract funds from taxpayers and, through appropriations, transferred these funds to the Executive Branch. *See Flast*, 392 U.S. at 85-87. Just as in *Flast*, where the Executive Branch used funds appropriated by Congress to

advance religion by financing instruction and supplies, *id.*, here the Executive Branch used the money appropriated by Congress to advance religion through the mechanism of Faith-Based Conferences. The taxpayers here face the same injury at issue in *Flast*: the use of the taxing and spending power "to favor one religion over another or to support religion in general." *Id.* at 103.

This Court reinforced the distinction between direct and indirect expenditures last term by stating that taxpayers suffer concrete and judicially redressible injuries when the government *spends* tax money to further religion, but not when taxpayers challenge government actions that have less direct effects on tax dollars. *DaimlerChrysler Corp. v. Cuno*, 126 S.Ct. 1854, 1865 (2006). The taxpayers in this case have suffered the very injury that the Establishment Clause exists to prevent, the "'extract[ion] and spen[ding]' of 'tax money' in aid of religion," and courts can "redress that injury" through remedies such as "an injunction against the spending." *Id.* (quoting *Flast*, 392 U.S. at 106).

The Court of Appeals' decision hews to this Court's distinction between direct and indirect expenditures. As the Seventh Circuit stated, many government expenditures, such as the cost of praising religion in a speech, are incidental from the standpoint of injury to taxpayers—they do not add marginal costs and hence do not impact funds appropriated by Congress from the public fisc. 433 F.3d at 995-96. But the injury here involves a series of direct expenditures of taxpayer money, and consequently has an indisputable and non-incidental effect on taxpayers.

Because the taxpayers in this case challenge direct expenditures, none of the government's attempts to distinguish *Flast* withstand scrutiny. First, the government argues that this case, in contrast to *Flast*, does not involve a "direct dollars-and-cents injury," Pet. Br. at 20 (quoting *Doremus*, 342 U.S. at 434), but this contention rests solely on the

government's incorrect assumption that the taxpayers in this case do not challenge any direct expenditures. *See supra* p. 4. Compounding this fundamental error, the government then asserts that the taxpayers here challenge "'an insubstantial [*sic*—incidental] expenditure of tax funds in the administration of an essentially regulatory statute,'" which is insufficient to confer standing under *Flast*. Pet. Br. at 19 (quoting *Flast*, 392 U.S. at 102). Here again, the government assumes that the expenditures are "insubstantial" or "incidental" even though the taxpayers in this case challenge the direct expenditure of tax dollars at conference after conference.

The government also misreads *Flast* in attempting to limit the holding to cases where the government disburses funds to religious institutions. Pet. Br. 38-45. The government states that *Flast* "focused narrowly on the fear that Congress would use its power forcibly to transfer funds from taxpayers into the coffers of churches or other institutions"—a striking contention, since *Flast* involved no such transfer. *Id.* at 41. In *Flast*, the Executive Branch disbursed funds to state education agencies, which in turn directed those funds to local education agencies, which in turn used the funds to provide in-kind aid, in the form of instruction and textbooks to students, including religious school students. 392 U.S. at 86-87. Likewise, in this case, the government does not transfer funds to religious organizations but provides in-kind aid in the form of Faith-Based Conferences.

In any event, as the Court of Appeals observed, the government's distinction between in-kind and monetary aid would deny taxpayer standing where the government, without transferring funds, operates its *own* "mosque or other place of worship." 433 F.3d at 995. The government cannot claim fidelity to the original meaning of the Establishment Clause, Pet. Br. at 39-44, while advocating a test that would preclude challenges to federally-established churches. Although the government contends that such cases might allow certain

plaintiffs to bring suit in a different capacity than as taxpayers, *id.* at 34, *Flast* directly forecloses this argument. *See Flast*, 392 U.S. at 98 n. 17 ("[T]he taxpayer's access to federal courts should not be barred because there might be at large in society a hypothetical plaintiff who might possibly bring such a suit.").

Finally, the government contends that *Flast* and *Kendrick* addressed grant programs funded by specific congressional appropriations whereas this case involves general congressional appropriations. Pet. Br. at 24-25. This is a difference in nomenclature, not substance. While the government purports to champion Article III's concrete injury requirement, *id.* at 14, the type of spending program at issue has no effect on the nature or concreteness of the injury inflicted on taxpayers, because in either case taxpayers suffer the same injury—Congress extracts money from them and transfers it to the Executive Branch, which uses it to further religion. *See Flast*, 392 U.S. at 103 (Framers' concern was that "taxing and spending power would be used to favor one religion over another or to support religion in general").

C. The Injury Here Involves Direct Expenditures and Therefore Does Not Resemble the Injury in *Valley Forge College v. Americans United* and Related Cases

A proper understanding of the injury at issue reveals a sharp contrast between this case and cases such as *Valley Forge*. Simply put, taxpayers suffered no injury in *Valley Forge* because the government expended no money. Rather, in that case, the Department of Health, Education, and Welfare transferred a property to a Christian college at no charge under the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 471 *et seq.*, which allows the federal government to dispose of "surplus property" that has "outlived its usefulness." *Valley Forge*, 454 U.S. at 466.

In *Valley Forge*, the only direct expenditure even remotely related to the litigation was the money the government originally spent to acquire the property, but that occurred thirty years before the transfer at issue. *Id.* at 467. The transfer itself had no impact on the public fisc.

In *DaimlerChrysler*, this Court drew a clear line that separates *Valley Forge* both from *Flast* and from this case, stating, in cases that do not involve direct expenditures, "a litigant may not assume a particular disposition of government funds in establishing standing." 126 S.Ct. at 1865. By contrast, direct expenditures, in and of themselves, constitute an Article III injury. *Id.* In *Valley Forge*, an injury to taxpayers could only be established by indulging a chain of assumptions that would ultimately result in a benefit to taxpayers—for example, if the government did not donate the "surplus property" to a religious organization, it would sell the property, realize a financial windfall, and use the proceeds to reduce taxes.[27] By contrast, when direct expenditures are at issue, as in *Flast* and here, the injury consists of the "'very extract[ion] and spen[ding]' of 'tax money,'" and that injury suffices to confer standing. *DaimlerChrysler*, 126 S.Ct. at 1865 (quoting *Flast*, 392 U.S. at 106).

Valley Forge is inapposite also because Congress passed the Federal Property and Administrative Services Act not under the Taxing and Spending Clause, as in *Flast*, but under the Property Clause. *Valley Forge*, 454 U.S. at 466. Thus, in contrast to *Flast*, *Valley Forge* did not implicate the central concern of the Establishment Clause, which "'operates as a

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[27] In *Valley Forge*, such assumptions would likely have proven incorrect, as "there [was] no basis for believing that a transfer to a different purchaser would have added to Government receipts." *Valley Forge*, 454 U.S. at 480 n.17. Because an alternative recipient of the property, most likely another nonprofit group or local school district, would have been given the property at no cost, the decision to transfer the defunct property to a religious college did not affect the public fisc or injure taxpayers. *Id.*

specific constitutional limitation upon the exercise by Congress of the taxing and spending power.'" *Id.* at 479 (quoting *Flast*, 392 U.S. at 104). In this case, in contrast to *Valley Forge*, Congress extracted money from taxpayers under the Taxing and Spending Clause and transferred these funds to the Executive Branch, which used them to foster religion.

The government also attempts to liken this case to *Doremus*, where the Court found no taxpayer standing to challenge a state statute that provided for Bible reading at public schools, but this claim founders for similar reasons. Whereas the *Doremus* Court explicitly stated "[t]here is no allegation that this activity [Bible reading] . . . adds any sum whatever to the cost of conducting the school," *Doremus*, 432 U.S. at 433, convening Faith-Based Conferences requires direct out-of-pocket expenses, not just payment of salaries. The government therefore misses the mark entirely when it equates paying "teachers' salaries while they read from the Bible" in *Doremus* with paying "federal officials' salaries" when they attend Faith-Based Conferences. Pet. Br. at 29. In contrast to salaried time spent reading from the Bible, the expenditures at issue here impact taxpayers directly by causing the very sort of "dollars-and-cents injury" *Doremus* requires. 342 U.S. at 434.

Like *Valley Forge* and *Doremus*, other cases in which this Court has denied taxpayer standing involve government action unconnected to direct expenditures of funds appropriated by Congress. For example, the taxpayer in *United States v. Richardson*, 418 U.S. 166, 175 (1974), challenged accounting requirements applicable to the CIA under the Central Intelligence Agency Act of 1949, 30 U.S C. § 403a *et seq.*, but his suit did not involve any government expenditure and "[was] not addressed to the taxing or spending power." Likewise, the taxpayer in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), did not claim any improper expenditure but asserted the Incompatibility Clause

of the Constitution prevents simultaneous membership in the United States Congress and the Armed Forces Reserve. Aside from failing to contest direct expenditures, the plaintiffs in *Schlesinger* and *Richardson* did not assert claims under the Establishment Clause. *See Schlesinger*, 418 U.S. at 227-28; *Richardson*, 418 U.S. at 175. Therefore, no link existed between the challenged government action and the threat of using the taxing and spending power to extract funding for religious groups, the very threat that animates *Flast*. *See Flast*, 392 U.S. at 103-04.

D. The Court of Appeals Faithfully Applied This Court's Precedent Governing Taxpayer Standing

While the government confuses the nature of the taxpayer injury at issue by fixating on government officials' salaries, the Court of Appeals clearly stated that taxpayers do not have standing to assert an Establishment Clause challenge based solely on activities that do not involve direct expenditures such as the misuse of salaried time. 433 F.3d at 995. Although the government accuses the Court of Appeals of adopting a "funding ergo standing" rule under which "mere presence of federal funding is sufficient" to confer standing, Pet. Br. at 27, the Seventh Circuit did no such thing. Rather, it stated that "the fact that almost all executive branch activity is funded by appropriations does not confer standing to challenge violations of the establishment clause that do not involve expenditures." 433 F.3d at 995. In order for government action to "involve expenditures," there must be a "marginal or incremental cost to the taxpaying public of the alleged violation of the establishment clause." *Id.* Although a speech by the President entails "preparations, security arrangements, etc.," and although "an accountant could doubtless estimate the cost," the Court of Appeals held that such expenses, without more, do not confer taxpayer standing. *Id.* The Court reasoned that such costs, like official salaries, would be incurred regardless of whether the

President "mentioned Moses rather than John Stuart Mill," and hence, the decision to mention Moses would inflict no injury on taxpayers. *Id.* The Court of Appeals' decision, therefore, imposes clear limitations on taxpayer standing and does not equip each taxpayer with "roving license" to litigate Establishment Clause violations as the government maintains, Pet. Br. at 10, or "reduce the test for taxpayer standing into a pleading question."[28]

The government simply attacks a straw man of its own making when it asserts that the Framers did not remonstrate against "Executive Branch officials" using "their taxpayer-funded salaries" to "speak favorably about religion" or "meet with representatives of religious groups." Pet. Br. at 39. While the government takes pains to catalogue instances in which officials have mentioned religion in speeches, writings, and proclamations, *id.* at 39-41 & n.13, these instances do not involve direct expenditures and therefore bear no relation to this case, where the government organized and funded conferences in support of a system of grants to religious institutions. In any event, the speeches and proclamations cited by the government mentioned religion but did not advance it in any concrete sense, whereas the conferences at issue here directly aid religion by training religious groups to acquire grant funds.

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[28] Pet. Br. at 35. In any case, the government's view that litigants can easily "plead around" standing limitations reflects a misunderstanding of the Federal Rules of Civil Procedure. In contrast to Rule 12(b)(6), which allows only facial attacks on the complaint, Rule 12(b)(1), allows factual challenges to jurisdiction, in which the District Court does not assume the truth of allegations but "weigh[s] the conflicting evidence." *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). *See also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88 (1998) (challenge to standing raised on Rule 12(b)(1) motion). Therefore, regardless of what the complaint states, the government can force the plaintiff to prove that a factual basis for standing exists. *Ohio Nat. Life Ins. Co*, 922 F.2d at 325.

Finally, the distinction that the Court of Appeals drew between government activities that do and do not create new costs is firmly rooted in Article III's cases and controversies requirement. When government officials misuse their salaried time, or misuse their office space, by engaging in unconstitutional activities, any injury to taxpayers is "abstract" and "generalized," *Valley Forge*, 454 U.S. at 475. The injury would not be "redressed by the requested relief," *Allen v. Wright*, 468 U.S. 737, 751 (1984), because funds would be used to pay salaries and maintain offices regardless of whether a court ordered government officials to cease fostering religion. But holding massive conferences at hotels across the nation injures taxpayers by spending taxpayer dollars directly, *see DaimlerChrysler*, 126 S.Ct. at 1865, and assaults the public fisc by requiring new and immediate spending. Courts can grant concrete relief to taxpayers and relieve the unconstitutional burden on public funds by ordering the Executive Branch to cease expending taxpayer money on Faith-Based Conferences. *Id.* Such a remedy would prevent government attempts to "employ its taxing and spending powers" to discriminate on the basis of religion, the very injury the Establishment Clause was conceived to prevent. *Flast*, 392 U.S. at 104.

CONCLUSION

For the foregoing reasons, and for those set forth in the Respondents' brief, the judgment below should be affirmed.

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